Office - Supreme Court, U.S.
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No. 82-409

In the Supreme Court of the United States

OCTOBER TERM, 1982

MARTIN E. HECHT AND INVENTEL CORPORATION,
PETITIONERS

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether petitioners offered and sold a security in the form of an investment contract, as defined by *SEC* v. *W.J. Howey Co.*, 328 U.S. 293 (1946), when, as both courts below found, they led investors to expect profits from the entrepreneurial and managerial efforts of others and structured the offering to give investors only insubstantial and illusory legal rights to control the enterprise, which, in any event, the investors were incapable of exercising.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	9
Conclusion	17

TABLE OF AUTHORITIES

Cases:

Bell v. *Hood*, 327 U.S. 678 9

Fargo Partners v. *Dain Corp.*, 540 F. 2d 912 ..... 13, 15

General Talking Pictures Corp. v. *Western Electric Co.*, 304 U.S. 175 10

Gordon v. *Terry*, 684 F. 2d 736 ..... 12, 15

International Brotherhood of Teamsters v. *Daniel*, 439 U.S. 551 15-16

Mr. Steak, Inc. v. *River City Steak, Inc.*, 324 F. Supp. 640, aff'd, 460 F. 2d 666 ..... 13, 14

Schultz v. *Dain Corp.* 568 F. 2d 612 13

SEC v. *C.M. Joiner Leasing Corp.*, 320 U.S. 344 ..... 8, 10

SEC v. *Glenn W. Turner Enterprises, Inc.*, 474 F. 2d 476, cert. denied, 414 U.S. 821 ..... 5, 8, 15, 16

SEC v. *Koscot Interplanetary, Inc.*, 497 F. 2d 473 15

Page

Cases—Continued:

SEC v. *W.J. Howey, Co.*, 328 U.S. 293 ..... 2, 5, 7, 14, 15, 16

Tcherepnin v. *Knight*, 389 U.S. 332 16

United Housing Foundation, Inc. v. *Forman*, 421 U.S. 837 ..... 15, 16

United States v. *Johnston*, 268 U.S. 220 10

Williamson v. *Tucker*, 645 F. 2d 404, cert. denied, 454 U.S. 897 ..... 11, 12, 15

Statutes and regulation:

Securities Act of 1933, 15 U.S.C. (& Supp. V) 77a *et seq.* 6

Section 2(1), 15 U.S.C. 77b(1) 7
Section 5(a), 15 U.S.C. 77e(a) 2
Section 5(c), 15 U.S.C. 77e(c) 2
Section 17(a), 15 U.S.C. 77q(a) 2

Securities Exchange Act of 1934, 15 U.S.C. (& Supp. V) 78a *et seq.* :

Section 3(a)(10), 15 U.S.C. 78c(a)(10) 7
Section 10(b), 15 U.S.C. 78j(b) 2

Rule 10b-5, 17 C.F.R. 240.10b-5 2

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 687 F.2d 577. The opinion of the district court (Pet. App. 20a-54a) is reported at 524 F. Supp. 866.

JURISDICTION

The judgment of the court of appeals was entered on June 10, 1982 (Pet. App. 55a-56a), and the petition for a writ of certiorari was filed on September 7, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Securities and Exchange Commission filed a complaint against petitioners and others[1] in the United

[1]Prior to trial the other six defendants consented to the entry of final orders of permanent relief against them. Pet. App. 10a, 21a-22a & n.1.

States District Court for the Southern District of New York, alleging violations of registration and antifraud provisions of the federal securities laws.[2] The complaint alleged that petitioners had engaged in the fraudulent offering of unregistered securities in the form of investment contracts through the offer and sale of licenses granted by defendant Aqua-Sonic Products Corporation for the exclusive right to market within a particular territory certain professional dental products known as Steri-Products. According to the Commission, the products were to be developed and manufactured by Aqua-Sonic, to be promoted by a national advertising campaign arranged by Aqua-Sonic, and to be marketed by defendant Ultrasonic Products Corp. acting as the licensees' exclusive sales agent. Following a seven-day trial devoted principally to the issue whether the license and sales agency arrangement offered by the defendants was an investment contract, the district court found that petitioners had violated the provisions alleged in the Commission's complaint and issued a permanent injunction against future violations. The court of appeals affirmed (Pet. App. 1a-19a), finding that the economic realities of the case were that the license and sales agency arrangement were a package offered in a way designed to "attract the passive investor" (*id.* at 19a). Accordingly, the appellate court concluded (*ibid.*) that the Commission had established the elements of the investment contract test set forth by this Court in *SEC* v. *W.J. Howey Co.*, 328 U.S. 293 (1946).

1. Petitioner Martin Hecht is an attorney. Hecht, together with two co-defendants, was a partner in the law firm of Schekter, Aber and Hecht (the firm) during the

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[2]Sections 5(a), 5(c) and 17(a) of the Securities Act of 1933, 15 U.S.C. 77e(a), 77e(c) and 77q(a); Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), and Rule 10b-5 promulgated thereunder, 17 C.F.R. 240.10b-5.

period of the offering at issue. In late 1978, the members of the firm created petitioner Inventel Corporation for the purpose of promoting tax-sheltered offerings under Hecht's direction. Hecht then devised and the firm structured a tax shelter plan to finance the production of the Steri-Products[3] through the sale of licenses to sell the products in specific geographic territories in the United States, coupled with an advertising fund and an exclusive sales agency arrangement under which the products would actually be sold by Ultrasonic, the sales agent, rather than by the licensees. The production and sale of the Steri-Products were to be effected through a group of interlocking corporations owned or controlled by the inventor and the firm partners. Pet. App. 2a-3a, 23a-24a, 33a-35a, 38a, 41a-42a, 50a.

The district court's finding, which was affirmed by the court of appeals, was that the license, advertising fund, and sales agency were offered as a package. Pet. App. 14a-15a, 37a-38a. The information memorandum drafted by the firm for distribution to prospective licensees stated that the licensee could either retain a sales agent or undertake marketing of the products himself through direct sales to dental supply wholesalers (*id.* at 5a n.1, 28a-29a).[4]

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[3]The Steri-Products were intended to deliver prepackaged sterile water or medication, instead of tap water, to be used in a dental cleaning process (Pet. App. 22a-23a). In 1978, when the securities offering took place, the working models of the products were in fact incapable of delivering fluids that were sterile or of being adapted to mass production (*id.* at 39a). At the time of trial in June 1981, the devices still had not been produced (*id.* at 39a-40a).

[4]The information memorandum stated that a licensee could sell the Steri-Products directly to dentists but that the more common practice in the industry was to sell to dental supply wholesalers ("dental depots"), which, in turn, sell directly to dentists (E. 518). The offering materials assumed that all sales, whether by a sales agent or by the licensee himself, would be effected through dental depots (E. 514A-515, 583A). ("E." refers to the exhibit volumes of the joint appendix in the court of appeals.)

Included in the offering materials was an ostensibly optional offer by defendant Ultrasonic to act as an exclusive sales agent; the promotional materials did not offer or advise of the existence of any sales agent other than Ultrasonic (*id.* at 9a, 37a).[5] The district court found, and the court of appeals agreed, that under the sales agency contract, Ultrasonic was to perform all of the licensee's significant marketing obligations imposed by the license agreement (*id.* at 6a, 35a).[6]

The Aqua-Sonic/Ultrasonic offering was managed by Hecht, who, acting through Inventel, solicited a network of salesmen who placed the licenses (Pet. App. 8a, 35a, 41a-42a). As the court of appeals observed (*id.* at 16a), the salesmen were persons who "could be expected to and did contact typical passive investors." The principal selling feature of the package was the promised tax shelter effect of the non-recourse method of financing employed for the license

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[5]The sales agency fee (payable in addition to the license fee, typically $159,500, and the mandatory contribution to the advertising fund, $14,000) was a non-refundable $16,600 fee payable partially by cash and a recourse note, and the remainder through a non-recourse note payable out of the proceeds of sales (Pet. App. 6a-7a, 18a). The sales agency contract gave the licensee authority to cancel the contract on 90 days' notice (*id.* at 6a, 32a). Under that contract, however, regardless of whether the sales agency contract was cancelled the licensee would continue to be obligated to pay the non-recourse note to Ultrasonic out of the proceeds of sales (*id.* at 18a).

[6]Both courts observed that Ultrasonic was solely responsible for "finding customers, taking orders, collecting proceeds, and paying expenses and taxes" (Pet. App. 6a, 35a). In addition, both courts concluded that the licensee's control over price was insignificant because the sales agency contract authorized Ultrasonic to reduce the sales price unilaterally so long as the reduction came from its 20% sales commission (*ibid.*). Because Ultrasonic would still receive prepayments on the non-recourse note for any sales regardless of its sales commission (see note 5, *supra*), this provision permitted Ultrasonic independently to influence the success of the marketing in any territory by allowing it up to a 20% flexibility in its sales price.

and the sales agreement (*id.* at 14a-15a, 50a-51a). Indeed, the offering materials highlighted the substantial tax advantages available to licensees who also subscribed to the sales agency agreement (*id.* at 8a, 14a-15a). Investors were assured that during the first two years they would receive a three dollar income tax deduction for every dollar invested in the complete Aqua-Sonic package, consisting of the license, the advertising fund, and the sales agreement (*id.* at 8a, 34a-35a).

Ultimately, 50 persons invested approximately $12,100,000, of which $900,000 was in cash and recourse promissory notes. None of the licensees had any experience selling dental products, and in most cases the licensees' territories were not even close to their residences. Each licensee subscribed to the sales agency arrangement; indeed, some of the investors were not even aware of a formal distinction between the license and the sales services offered to them. Pet. App. 8a-9a, 36a-38a.

2. The district court concluded that petitioners had offered and sold a security in the form of an investment contract within the meaning of this Court's decision in *SEC* v. *W.J. Howey Co.*, 328 U.S. 293 (1946). On the principal contested issue, the district court held that the offering would constitute an investment contract if the licensees' expectations of profits arose from the " 'undeniably significant' " efforts of others. Pet. App. 46a-47a, citing *SEC* v. *Glenn W. Turner Enterprises, Inc.*, 474 F.2d 476, 482 (9th Cir.), cert. denied, 414 U.S. 821 (1973). Even considering the marketing aspects of the enterprise alone, as urged by petitioners, the district court found, in view of the "actual centrality" of the sales agency to the investment scheme, that the efforts of others "would be 'undeniably significant' " to any expectation of profits (Pet. App. 47a).

The district court, however, viewed the relevant enterprise as consisting of "far more than the sales agency" (Pet. App. 47a). The court found, first, that while the sales agency was "purportedly an optional feature of the Aqua-Sonic offering" (*id.* at 38a), in economic reality it was an inseparable part of a combined enterprise in which

> Aqua-Sonic was responsible for the development and production of the products and Aqua-Sonic, Ultrasonic and the Advertising Fund for the marketing and promotion of the products.

Ibid. Second, with respect to the scope of investor control over this combined enterprise, the district court found (*id.* at 48a) that

> [b]ecause of the nature of the products being offered, the character of the sales agency and the nature of the industry to be served, the Aqua-Sonic licensees were dependent, passive and incapable of [even] latent investor control, or, in other words, unable to exercise whatever powers over the enterprise they formally retained.

Accordingly, the district court concluded (*id.* at 51a), the investors here "in fact" were "totally dependent" on the efforts of others.[7]

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[7]Petitioners had conceded that if the licenses were held to be investment contracts, the registration provisions of the Securities Act had been violated. Petitioners also conceded that the omission of information concerning the role and financial interests of the promoters and the use of the proceeds of the offering rendered their promotional materials fraudulent. In addition, the district court found a tax opinion drafted by the firm and furnished to investors misleading, the financial projections provided investors without foundation, and that misrepresentations had been made concerning the marketability and need for the Steri-Products. Pet. App. 40a-41a. See also *id.* at 10a; Pet. 3.

3. The only issue on appeal was whether the licensing scheme was a security in the form of an investment contract within the meaning of Section 2(1) of the Securities Act of 1933, 15 U.S.C. 77b(1), and Section 3(a)(10) of the Securities Exchange Act of 1934, 78c(a)(10). Petitioners claimed that the offering did not involve an investment contract because the sales agency agreement was optional and, further, because even under that agreement the licensee retained a right to cancel the sales agency. Thus, petitioners argued, the licensees' expectation of profits was not derived solely from the efforts of others as required by this Court's *Howey* decision. See Pet. App. 12a.

The court of appeals rejected a literal interpretation of the word "solely" as used by this Court in *Howey, supra*, 328 U.S. at 299. Pet. App. 12a-13a. Rather, the court acknowledged (Pet. App. 13a) this Court's admonition that investment schemes be considered "in light of their economic realities," noting (*ibid.*) "the ease of circumvention [if] the 'solely' language in *Howey* were to be taken literally." Accordingly, Judge Friendly, writing for the court (*ibid.*), applied to the facts at hand the test

> whether, under all the circumstances, the scheme was being promoted primarily as an investment or as a means whereby participants could pool their own activities, their money and the promoter's contribution in a meaningful way.

Applying these criteria first to petitioners' assertion that the sales agency arrangement was optional, the court concluded (Pet. App. 14a) from the facts that "it can hardly be said that realistically the agency agreement was a mere option." The offering materials, the court found (*ibid.*), presented the license and agency agreements as a "package." The court further found that the additional tax benefits accruing to investors who took advantage of the sales

agency were a compelling inducement to acquire that agency. *Id.* at 14a-15a. Finally, the court was persuaded by petitioners' "plan of distribution." See *SEC* v. *C.M. Joiner Leasing Corp.*, 320 U.S. 344, 353 (1943). The court found that petitioners had sought out licensees who could be expected to be passive investors, not persons with experience in the distribution of dental supplies. Moreover, the fact that all 50 licensees had accepted the sales agency option persuaded the court that petitioners sought through their plan of distribution precisely what they achieved—investors who would not be in a position to exercise any control over the enterprise. Pet. App. 16a-17a.

The court also rejected petitioners' claim based on the investors' right to cancel the sales agency. It reasoned that investors who would be induced by the terms and nature of the offering to take advantage of the sales agency option in the first place would not be likely to terminate that option shortly thereafter. The court further found that the implausibility of cancellation was compounded by the fact that the sales agency fee was non-refundable after termination (Pet. App. 18a). The court thus concluded (*id.* at 17a-18a):

> [I]f it would circumvent the purposes of the securities laws to exonerate defendants who had the guile to insert the requirement that the buyer contribute a modicum of effort [see *SEC* v. *Glenn W. Turner Enterprises, Inc.*, *supra*], it would be an even greater affront to the policies of these laws to exempt schemes that preserved the mere right to provide some effort.[8]

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[8]Because the court of appeals concluded that the licensees had no real option to refuse the sales agency, it was satisfied that an investment contract arose simply from the fact of the licensee's reliance on the efforts of the sales agent. The court thus did not reach the district court's further determination that the offering constituted an investment contract because of the fact "that here the investment was in a new product

ARGUMENT

The decision of the court of appeals is correct, comports with this Court's decisions construing the term "investment contract," and does not conflict with any decision of any other court of appeals. Further review by this Court therefore is not warranted.[9]

1. Petitioners assert (Pet. 11-17) a conflict between the decision below and decisions of other courts of appeals which they construe as holding that no investment contract exists where the purchaser possesses the legal right and the non-illusory practical ability to control the business. Even assuming petitioners' reading of those cases is correct, in view of the factual findings of the courts below--that the nominal legal rights retained by the licensees were insubstantial and illusory and that, in any event, the investors were incapable of control over the venture offered—the cases on which petitioners rely would not have yielded a different result.

a. Petitioners claim (Pet. 9, 16-17) that the Aqua-Sonic licensees possessed the legal right to control the venture because of rights reserved over the marketing of the products, because they were not required to hire Ultrasonic as a sales agent in the first place, and because they were

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which had never reached the market and the consequent strong dependence of licensees upon Aqua-Sonic for its development and manufacture." Pet. App. 19a n.8.

[9]Contrary to petitioners' assertion (Pet. 3, 9), the question whether federal jurisdiction lies over the Commission's action is not presented here. The Commission's allegations concerning the existence of an investment contract are plainly substantial. See *Bell* v. *Hood*, 327 U.S. 678, 682-683 (1946).

free to discharge that sales agent on 90 days' notice. But these assertions are belied by the district court's findings of fact, which were affirmed on appeal, and which petitioners purport not to challenge here (Pet. 4 & n.*). Further review of these purely fact-bound determinations is not warranted. *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U.S. 175, 178 (1938); *United States* v. *Johnston*, 268 U.S. 220, 227 (1925).

Both courts below found that by retaining the sales agent, the licensee delegated all significant marketing functions associated with the sale of the licensed products (see pages 4-5 & note 6, *supra*). Moreover, with respect to the economic realities of the option to accept the agency, the court of appeals applied this Court's admonition in *SEC* v. *C.M. Joiner Leasing Corp.*, *supra*, 320 U.S. at 353, that a court must examine "the plan of distribution, and the economic inducements held out to the prospect," and concluded that there was no realistic option to refuse. The tax advantages were substantial, the licensees were inexperienced in selling dental products, and the geographic location of the territories often made individual marketing impracticable. Finally, the court of appeals concluded that exercise of the cancellation option was implausible, particularly since the sales agency fee was non-refundable. See pages 7-8, *supra*.

Petitioners also assert (Pet. 9, 16-17) that the courts below found that the licensees possessed sufficient business experience and background to exploit their licenses. In fact, the district court expressly concluded (Pet. App. 48a) that the investors were "incapable of latent investor control" over the enterprise viewed as a whole—including the development, manufacture and marketing of the Steri-Products. *Id.* at 51a. The court of appeals

similarly found (*id.* at 16a) that the investors targeted for solicitation were investors who could not reasonably be believed to be "capable of undertaking distribution on their own." Both courts specifically found (*id.* at 9a, 37a) that the Aqua-Sonic licensees had no experience selling dental products.

b. In the face of these unassailable, concurrent findings of fact, the alleged conflict among the circuits disappears. In *Williamson* v. *Tucker*, 645 F.2d 404, cert. denied, 454 U.S. 897 (1981) (Pet. 11-12), the Fifth Circuit considered whether the offer of interests in joint ventures owning undivided interests in real estate constituted the offer of an investment contract. Under the terms of the joint venture agreement, certain legal rights over the venture were held by the joint venturers, but the managerial functions had been delegated to the promoter. Acknowledging that, notwithstanding the apparent legal control retained by the joint venturers, the economic reality of the venture must govern the investment contract determination (645 F. 2d at 418), the court of appeals reversed the district court's dismissal of a rescission action by the purchasers predicated on violations of the federal securities laws. The court directed the district court on remand to consider whether the powers held by the venturers under the particular joint venture agreement were "meaningful." If those powers were found not to be illusory, the district court was then to consider whether the investor nonetheless was "in fact dependent" on the promoter or manager based on the particular facts of the case. *Id.* at 422-426.[10]

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[10]Petitioners quote (Pet. 12) language from *Williamson* to the effect that a bare right to control retained by purchasers is sufficient to remove the offering from the reach of the securities

Here, the courts below made findings on the precise issues to which the Fifth Circuit had directed the district court's consideration.[11] In view of these findings—that any legal right to control retained by the Aqua-Sonic licensees was insubstantial and illusory and that the investors lacked the practical ability to exercise such control—the Fifth Circuit's decision in *Williamson* is of no avail to petitioners.[12]

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laws. In view of the *Williamson* court's direction to the district court to determine on remand the economic realities of any retained powers and the investors' actual dependence on the promoters or managers, we agree with the court of appeals' characterization of this language as "dicta" (Pet. App. 17a).

[11]The recent decision by the Eleventh Circuit in *Gordon* v. *Terry*, 684 F.2d 736 (1982), is in accord with *Williamson*. There too the court reversed a district court's decision on summary judgment that real estate syndications were not investment contracts. The real estate agreements at issue provided that investors, by majority vote, retained control over all decisions that would affect the success of the ventures. 684 F.2d at 740. Relying on the Fifth Circuit's decision in *Williamson*, *supra*, the court of appeals remanded for a determination whether, notwithstanding the investor's formal right to control, he nonetheless was dependent on a unique knowledge of the Florida real estate market that the promoters had claimed, thus rendering the investor, in practical effect, dependent on the promoters for any expectation of profits. 684 F.2d at 741-743. Here, both courts below made the critical finding that the investors were in fact dependent on the efforts of the promoters (Pet. App. 16a-17a, 51a).

[12]In analyzing the practical ability of the investors to exercise any retained right to control the investment scheme, the court of appeals took into account (Pet. App. 16a) the need for experience in the specific type of enterprise involved—here, experience in selling dental products. While petitioners read *Williamson* as holding that mere generalized business experience is sufficient (see Pet. 12 n.3), we note that the enterprise involved in that case was real estate development rather than, as here, the marketing of untested professional dental products. In any event, the investors' practical ability to effect control is not dispositive of this case in view of the lower courts' alternative conclusion that the legal powers retained by the Aqua-Sonic licensees were insubstantial and illusory.

In *Schultz* v. *Dain Corp.*, 568 F.2d 612 (1978), and *Fargo Partners* v. *Dain Corp.*, 540 F. 2d 912 (1976), on which petitioners also rely (Pet. 14-16), the Eighth Circuit held that sales of apartment complexes coupled with management contracts that had been required as a condition of the particular type of financing offered were not investment contracts. Those cases involved individual real estate transactions, negotiated at arms' length, by purchasers with sufficient bargaining power to establish their own purchase terms. See 568 F. 2d at 615. In *Schultz*, summarizing the basis for its holding in both cases, the Eighth Circuit noted (*ibid.*) that the offer of the apartment complex itself did not require the purchaser to surrender his individual control. The court explained (*ibid.*): "[The purchaser's] position is that of any landowner who does not wish to manage a property himself and delegates the responsibility to an agent." Unlike the foregoing cases, which involved real estate entrepreneurs who retained ultimate control, the courts below found that Aqua-Sonic licensees were inexperienced in the dental product business and retained no similar legal control.

In *Mr. Steak, Inc.* v. *River City Steak, Inc.*, 460 F.2d 666 (1972) (Pet. 13-14), the Tenth Circuit affirmed a determination that the sale of a restaurant franchise was not the sale of an investment contract. The franchise agreement provided that the franchisor could select the manager if the franchisee failed to act, in which event the franchisor would be responsible for directing the management of the restaurant. 460 F. 2d at 669-670. The franchisee, however, retained an " 'active, if severely circumscribed, role' " in the conduct of the restaurant, including the power to terminate the employment of the manager. *Id.* at 669, quoting *Mr. Steak, Inc.* v. *River City Steak, Inc.*, 324 F. Supp. 640, 645 (D. Colo. 1970). Even though the franchisee had delegated its

managerial responsibility and declined to exercise its powers of control, the court found no investment contract. It emphasized that the franchisee " 'was [not] an uninformed investor. It was acquainted with the nature of the business it undertook.' " 460 F. 2d at 670, quoting 324 F. Supp. at 645. The court further noted that the franchisee had not shown " 'it lacked the requisite knowledge, skill or expertise' " to " 'direct[] the operations of the restaurant' " (*ibid.*).

The circumstances of this case are substantially different. Unlike in *Mr. Steak*, where the court found that the franchisee retained a limited but active role in the franchise, the courts below found that no significant marketing powers were retained by the Aqua-Sonic licensees and that any rights they did retain were illusory. Furthermore, in contrast to the business experience and ability of the franchisee in *Mr. Steak*, the persons solicited here were, as the court of appeals found (Pet. App. 16a), "primarily * * * investors who could not reasonably be believed to be desirous and capable of undertaking distribution on their own."[13]

2. In *SEC* v. *W.J. Howey Co.*, 328 U.S. 293, 299 (1946), this Court held that an investment contract arises where "a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party." Petitioners suggest (Pet. 18-21) that the Court

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[13]Although the question was reserved by the court of appeals, there is an additional ground for distinguishing *Mr. Steak*. The district court found (Pet. App. 47a-48a) the licensees "entirely dependent" on Aqua-Sonic for the development and manufacture of the Steri-Products, without which sales could not be effected. The fortunes of the Aqua-Sonic licensees thus were inextricably interwoven with those of the promoters. By contrast, the *Mr. Steak* court noted (460 F. 2d at 670, quoting 324 F. Supp at 645) that the franchisee's fortune " 'stands or falls independently of [the franchisor's] success or failure.' "

reconsider the "solely" language of the test formulated in *Howey* in view of lower court decisions that have departed from literalism by looking to the economic realities of the particular investment scheme at issue. Since the lower courts have had no difficulty construing the *Howey* test and applying it in a consistent manner, however, intervention by this Court is not warranted.[14]

Noting the ease with which the securities laws could be circumvented if the "solely" language of *Howey* were taken literally (Pet. App. 13a), the court below joined every other court of appeals that has considered the question in refusing to construe the term strictly. See *Gordon* v. *Terry*, 684 F.2d 736, 741 (11th Cir. 1982); *Williamson* v. *Tucker*, *supra*, 645 F.2d at 418-419; *Fargo Partners* v. *Dain Corp.*, *supra*, 540 F.2d at 914-915; *SEC* v. *Koscot Interplanetary, Inc.*, 497 F.2d 473, 479-484 (5th Cir. 1974); *SEC* v. *Glenn W. Turner Enterprises, Inc.*, *supra*, 474 F.2d at 482. In so holding, the court of appeals carefully reviewed this Court's opinion in *Howey* (Pet. App. 10a-11a), which adopted, for purposes of the federal securities laws, the state blue sky law definition of investment contract. 328 U.S. at 298. There, the Court emphasized that state courts had construed that term broadly and that "[f]orm was disregarded for substance and emphasis was placed upon economic reality." *Ibid.* See also *International Brotherhood of Teamsters* v. *Daniel*, 439

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[14] In *United Housing Foundation, Inc.* v. *Forman*, 421 U.S. 837, 852 (1975), this Court described the "touchstone" of its decisions defining a security as "the presence of an investment in a common venture premised on a reasonable expectation of profits to be derived from the entrepreneurial or managerial efforts of others." The Court reserved the question whether the word "solely," as used in the *Howey* test, should be construed literally or " 'realistically, so as to include within the definition those schemes which involve in substance, if not form, securities.' " *Id.* at 852 n.16, quoting *SEC* v. *Glenn W. Turner Enterprises, Inc.*, *supra*, 474 F.2d at 482.

U.S. 551, 558 (1979); *United Housing Foundation, Inc.* v. *Forman*, 421 U.S. 837, 851-852 (1975); *Tcherepnin* v. *Knight*, 389 U.S. 332, 336 (1967). As the court of appeals observed (Pet. App. 12a), the Ninth Circuit some years ago had relied on these principles in refusing to apply the "solely" test literally and in adopting the following, more realistic test (*SEC* v. *Glenn W. Turner Enterprises, Inc.*, *supra*, 474 F.2d at 482):

> whether the efforts made by those other than the investor are the undeniably significant ones, those essential managerial efforts which affect the failure or success of the enterprise.

Relying on *Glenn W. Turner* and its progeny, the court below concluded (Pet. App. 13a) that, if faced with the question, this Court would not apply the word "solely" literally, but rather would consider

> whether, under all the circumstances, the scheme was being promoted primarily as an investment or as a means whereby participants could pool their own activities, their money and the promoter's contribution in a meaningful way.

While the court of appeals' test employs different language than that used by the *Glenn W. Turner* court, it yields no different result.[15] Since both tests embody this Court's directives to disregard form for substance and to look to the economic reality of the scheme being promoted, further review by this Court is not warranted.

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[15]Indeed, the district court reached the same result by employing the *Glenn W. Turner* test. See Pet. App. 47a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1982